United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig. with affidavit of mailing

74-1213

To be argued by
THOMAS R. MAHER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1213

UNITED STATES OF AMERICA,

Appellee,

—v.—

JUAN DANIEL GONZALEZ, JR.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1213

UNITED STATES OF AMERICA,

Appellee,

—v.—

JUAN DANIEL GONZALEZ, JR.,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Juan Daniel Gonzalez, Jr. appeals from a judgment of conviction entered on February 8, 1974 in the United States District Court for the Eastern District of New York. The conviction followed a one day, non-jury trial before the Honorable Mark A. Costantino on a single count indictment charging Gonzalez with the wilful failure to report for induction from November 1970 to June 26, 1972, the date of the indictment (50 U.S.C. App. § 462(a) (1971)).

Gonzalez was sentenced on February 8, 1974. A three year sentence was suspended and Gonzalez was placed on probation for three years.

On appeal, Gonzalez makes three claims of error. First, he argues that the induction was invalid because he was unacceptable at the time of his pre-induction physical as a result of criminal charges then pending against him;

second, appellant insists that the Government's allegedly inadequate denial of electronic surveillance requires a remand to the District Court for essentially an exploratory proceeding; finally, Gonzalez contends that the District Court improperly failed to impose sentence (probation) under the Youth Corrections Act pursuant to Title 18, United States Code, Section 4209.

Statement of Facts

The only evidence introduced at trial was the contents of appellant's Selective Service file. It revealed the following facts:

Juan Daniel Gonzalez duly registered with Local Board 45 in Brooklyn, New York in October 1965. At that time, he was a full-time student at Columbia University due to graduate in 1968. As a result, Gonzalez was immediately granted a student deferment.

In July 1968, appellant sought a hardship deferment on the grounds that his mother and sister, who was attending college, were financially dependent upon him. At the same time, appellant advised his Local Board that he was then employed as an Educational Trainer with the Neighborhood Youth Corps.

The Local Board responded to this request by supplying appellant with a Dependency Questionnaire (SSS Form 118) which sought additional information concerning appellant's hardship claim. Appellant did not complete or return the Questionnaire. Finally, in October 1968, the Local Board invited appellant to meet with them to discuss his classification.

Gonzalez met with his Local Board on October 16, 1968. At this time, however, he abandoned his claim for a hardship deferment and instead requested an occupational deferment in view of his employment with the Harlem Educational Program. The Local Board considered this latest claim and re-opened appellant's classification. However, in November 1968, appellant was classified 1-A and advised that he had a right to meet again with the Board to discuss the classification and to appeal the classification to the State Appeal Board. By letter dated December 5, 1968, Gonzalez accepted the Local Board's invitation to appear before them.

In the meantime, appellant had been ordered to report for pre-induction physical on March 18, 1969. At the time of this examination, a charge of criminal trespass was pending against appellant. Although Gonzalez informed a government psychiatrist during the examination that the charge had been dropped, one of the processing sheets did bear the stamp, "Administrative Reject," and the notation that processing personnel had verified with appellant's attorney that the charge was in fact pending at the time of the pre-induction examination. In any event, appellant passed the physical and mental examinations and was found fit for military service. On March 27, 1969, a Statement of Acceptability (DD Form 62) was mailed to appellant.

At that time, appellant's appeal from his 1-A classification was of course still pending. As he had requested earlier, a meeting was scheduled with the Local Board on April 16, 1969. Gonzalez failed to appear or to provide the Board with any supporting information from his employer. Not too surprisingly, he was informed on April 18, 1969 that his Local Board had retained him in the 1-A classification and in January 1970, the State Appeal Board unanimously affirmed the Local Board's action.

Finally, in November 1970, appellant's lottery number of 171 was reached and he was ordered to report for induction on November 19, 1970. Predictably, he failed to appear. Local Board 45 then attempted to contact Gonzalez through the Harlem Education Program which advised the Board that Gonzalez had not worked with that agency since 1968.

ARGUMENT

POINT I

The induction order was validly issued.

Appellant seeks a reversal of the judgment of conviction and a dismissal of the indictment based on the claim that the Armed Forces found him morally unacceptable and that therefore the induction of the Local Board did not have to be obeyed. This is a rather curious beginning for appellant's argument since it is clear beyond any doubt the Armed Forces did ultimately determine that appellant was acceptable for military service (See Appellant's Exhibit Folder, Document 25, item 22, second page). Appellant's real complaint is that he should have been found morally unacceptable because of the criminal charge that the District Court found was pending against him at the time of the pre-induction examination (Memorandum Decision, page 3). While this position might be procedurally accurate, appellant's standing to complain is indeed questionable since it was undoubtedly his erroneous assurance to the government psychiatrist during pre-induction that the charges had been dropped which brought about the conclusion of acceptability. In addition, appellant made no effort to correct the Armed Forces determination of acceptability even after he was formally advised of it by the Statement of

Acceptability on March 27, 1969. In fact, appellant never discharged his obligation of advising his Local Board about the progress of the criminal charge.

These considerations aside for the moment, the issue is simply this—should an error caused at least in part by misinformation supplied by appellant forgive appellant's wilful failure to comply with a valid induction order and in effect grant appellant immunity from prosecution for failing to do so.

The District Court answered in the negative and concluded that the applicable regulations (AR 601-270, para. 3-9(c))* were designed for the benefit, if not the protection, of the Armed Forces, not the individual inductees. The regulations do not confer a right upon a registrant but rather serve to prevent the Armed Forces from becoming embroiled in administrative or jurisdictional hassels with local authorities. At the same time, the regulations prevent the use of the Armed Forces by a registrant as a possible hedge against the continuing prosecution of pending criminal charges. As the District Court observed, the Fifth Circuit has recognized that the pending charge and moral waiver regulations were designed for the sole benefit of the

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* Army Regulation 601-270, paragraph 3-9 provides in pertinent part as follows:

> c. *Criminal charges filed and pending.*
>
> (1) Men who have criminal charges filed and pending against them alleging a violation of State, Federal, or territorial statute are unacceptable. . . . The statement "Suggest reevaluation of moral acceptability upon disposition of criminal charges" will be entered in the remarks section, DD Form 62 (Statement of Acceptability) for registrants found disqualified for induction on the basis of this paragraph.

Armed Forces. In *United States* v. *Brooks*, 415 F.2d 502, 510 (5th Cir. 1969), that court reasoned:

> [T]he defendant's argument implies that the regulation requiring a waiver where criminal charges are pending confers an absolute right upon a registrant to refuse induction unless the waiver is obtained. In the Court's view, the regulation is not susceptible of such a sweeping interpretation. While the regulation creates a right in the armed forces to refuse to accept a registrant under these conditions, it creates no right in the registrant to refuse to be inducted. The apparent purpose of the regulation is for the benefit of the armed forces in avoiding conflict with the civil authorities and in allowing the army to refuse to induct those who are morally unfit and not acceptable for that reason. To adopt the defendant's contention would mean that a registrant who has been ordered to report for induction could, prior to the date he is ordered to report, commit an offense and, if the charge was pending at the date he is to be inducted, use his criminal activity, even though minor in character, to his benefit as a valid reason for refusing to be inducted. A more reasonable view is that the regulation does not preclude the authorities from accepting a registrant when it determines after inquiry that a registrant is morally fit despite pending criminal charges.

See also United States v. *Benson*, 469 F.2d 1356 (7th Cir. 1972); *Nickerson* v. *United States*, 391 F.2d 760, 763 (10th Cir.), *cert. denied*, 392 U.S. 907 (1968); *United States* v. *Tarin*, 6 SSLR 3081 (S.D.N.Y. 1972), *aff'd without opinion*, — F.2d — (2d Cir.) decided October 19, 1973.

In the face of this authority, appellant offers only superficial distinctions. In fact, appellant's case presents a more compelling reason for the applications of the *Brooks* rationale than *Brooks* itself. Unlike the situation in ***Brooks,***

appellant's criminal charge had been disposed of by the time appellant was ordered for induction (Memorandum Decision, pages 8-9). Even assuming, as appellant argues, that AR 605-270 para. 3-9(c) does confer a right of sorts on registrants to refuse induction while charges are pending, it is difficult to see how any such "right" was denied appellant since at the time of his induction, the criminal trespass charge was no longer pending.

Of course, appellant contends the induction order was "legally void *ab initio*" so that to induct appellant properly would require a re-cycling of the entire pre-induction process (Appellant's Brief, page 11 (emphasis in original)). However, had appellant chosen compliance over defiance and reported for induction, he would have been entitled to a complete pre-induction examination.*

Appellant failed to pursue the administrative remedies available at induction. *Briggs* v. *United States*, 397 F.2d 370, 374 (9th Cir. 1968). In fact, appellant failed to exhaust any administrative remedies following his receipt of the Statement of Acceptability. Appellant had been given an opportunity to contest his 1-A Classification, but on April 16, 1969, he failed to appear before his Local Board or to provide them with any information relative to his classification. Thereafter, when he was informed that the State Appeal Board had retained him in the 1-A Classification, he was at the same time advised of his obligation to inform his Local Board about any fact which might affect his classification. Appellant did nothing. He neither corrected the record about the pending criminal charge nor told the Board when the charge was eventually disposed of. While appellant's failure to exhaust his administrative

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* AR 601-270, para. 3-18 requires in essence that if a registrant's induction date is more than one year subsequent to pre-induction, the registrant must be given a complete examination rather than a simple inspection. *See also* AR 601-270 para. 5-26(b).

remedies is somewhat understandable, since by so doing he would have avoided a problem which he now seeks to take advantage of, he cannot be rewarded by his purposeful inertia.

In summary, appellant's argument is frivolous. He does not challenge the sufficiency of the evidence; in fact, he admits that he wilfully failed to comply with the induction order. Appellant finds no fault with the action of the Local Board nor does he challenge that the Armed Forces properly found him physically and mentally qualified to serve. He argues simply that a mere clerical oversight, not resulting in any prejudice to him, invalidates the order to report for induction notwithstanding the fact that when the order was issued, criminal charges were no longer pending. In short, appellant seeks a windfall. His claim must be denied.

POINT II

The evidence at trial could not have been the product of any illegal electronic interception and, therefore, the Government was not required to affirm or deny the existence of unlawful surveillance.

Prior to trial, appellant made a broad motion seeking to discover whether the Government had engaged in the electronic surveillance of numerous places and whether, as a result of such surveillance, his conversations or those of his attorneys were overheard. The appellant sought pursuant to Title 18, United States Code, Section 3504, to have the Government affirm or deny the existence of such surveillance. The Government's response (set forth below*) is

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* Dear Mr. Morse:

This is in response to your letter of January 24, 1973, requesting information regarding electronic surveillance of Juan D. Gonzalez, Jr.

[Footnote continued on following page]

attacked on appeal as inadequate in form and substance. In pursuing his attack upon the Government's response, however, appellant has ignored the more immediate issue of whether or not any reply by the Government was necessary in the first instance. The Government respectfully submits that it was not.

The case against appellant was routine. As in the vast majority of Selective Service prosecutions, the only evidence received at trial was the appellant's Selective Service file which was, of course, created in part by the appellant himself. As is also a common practice, this evi-

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Pursuant to your request, I directed inquiries to the appropriate agencies of the Federal Government to determine if there had been any electronic surveillance of the conversations of Juan D. Gonzalez, Jr., or any electronic surveillance of conversations of conversations occurring on premises known to have been owned, leased, or licensed by him, whether or not he was present or participated in those conversations. The agencies to which inquiries were directed were: Federal Bureau of Investigation; Bureau of Narcotics and Dangerous Drugs; Internal Revenue Service, Intelligence Division; Secret Service; Bureau of Customs; Bureau of Alcohol, Tobacco and Firearms; and United States Postal Service.

The inquiries specifically covered all electronic surveillance, including that conducted pursuant to Title III of Public Law 90-351, as well as surveillance where one of the parties may have consented thereto. All agencies have now responded and have informed me that, based upon their records, there has been no electronic surveillance of conversations of this individual, and no electronic surveillance of conversations occurring on his premises.

If you have any further questions, please do not hesistate to contact me.

Sincerely,

A. WILLIAM OLSON
Assistant Attorney General
Internal Security Division
By:
JOHN H. DAVITT, Acting
Deputy Assistant Attorney General

dence was received by stipulation of the parties. Neither prior to trial nor on this appeal is appellant able to demonstate how the evidence offered at trial could have possibly been the product of an illegal wiretap. *In the Matter of David T. Dillinger, et al.*, 357 F. Supp. 949 (N.D. Ill. 1973), the Court concluded that the Government was not required to affirm or deny the existence of electronic surveillance because Section 3504 did not apply where "the limited nature of the evidence the government has stated it intends to offer in this case precludes the possibility that it could be inadmissible because [it was] the product of any illegal interception." *Id.* at 961. *See also United States* v. *Sellers*, 315 F. Supp. 1022 (N.D. Ga. 1970) (where the Court observed that "there is not the slightest possibility that the conviction was tainted by the unlawful surveillance. The only evidence necessary to convict for failing to report for and submit to induction is the evidence that an order to report was issued by the draft board and evidence that the defendant wilfully and knowingly failed or neglected to obey that order. It would be impossible for the government to obtain a conviction on the basis of any other evidence . . . ").

In view of the fact that the Government's evidence at trial could not have been the product of illegal surveillance, it would seem unnecessary to respond to appellant's many objections to the form and substance of the Government's reply. However, it is submitted, that even in the substantive arena appellant's arguments fare no better. In the first instance, appellant argues that the Government's response should have been in affidavit rather than letter form. The Government must concede that this Court would now require that the Government's response pursuant to 18 U.S.C. § 3504 be in the form of "sworn written representations. . . ." *United States* v. *Toscanino*, — F.2d — (2d Cir.), slip op. 3493, 3519, decided May 15, 1974, *petition for rehearing pending*. In any event, assuming any response was required, this deficiency could be easily cured.

Appellant next complains that the Government's reply made no mention of possible interceptions of attorneys' conversation. In his moving papers prior to trial, appellant sought, *inter alia*, "[a]ny and all actual voice records, . . . wiretapping, bugging, electronic or other similar surveillance of any wire or oral communications:

> (i) to which any attorney for defendant, his guests or employees was a party;"

In support of his applications, appellant submitted his own affidavit which made no mention of attorneys and showed no facts tending to support the claim that appellant's attorneys had been overheard. Significantly, no affidavits from any of the attorneys listed by appellant were provided. In fact, appellant did not even assert that any attorney had been the victim of illegal electronic surveillance. It is respectfully submitted, therefore, that the Government was not obligated to affirm or deny the existence of electronic surveillance of appellant's attorneys.

Recently the Ninth Circuit in *United States* v. *Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973), held that a party must supply sufficient evidence by affidavit in support of his claim that his attorney has been overheard before the burden shifts to the Government to conduct a search for such overhearings. Specifically, he must show:

> (1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;
>
> (2) the dates of such suspected surveillance;
>
> (3) the outside dates of representation of the witness by the lawyer during the period of surveillance;
>
> (4) the identity of the persons(s), by name or description, together with their respective telephone

> numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance tok place; and
>
> (5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.
>
> When these elements appear by affidavit or other evidence the Government must affirm or deny illegal surveillance pursuant to 18 U.S.C. § 3504(a).

See also Beverly v. *United States,* 468 F.2d 732 (5th Cir. 1972). Suffice it to say that appellant's bare discovery request does not come close to the information required by the *Alter* court so as to necessitate a Government response under Section 3504.

Appellant also argues that the Government's denial should have covered the surveillance at any location where appellant had an expectation of privacy. In his moving papers, appellant conveniently lists six such locations. Appellant does not offer, however, any authority for the proposition that he would have standing to challenge the admissibility of evidence derived from an electronics surveillance of a conversation to which he was not a party which occurred at a location other than the premises known to be owned, leased or licensed by him. *Alderman* v. *United States,* 394 U.S. 179 (1969); *United States* v. *Smilow,* 465 F.2d 802 (2d Cir.), *vacated on other grounds,* 409 U.S. 944 (1972).

Finally, appellant concludes with what he considers to be "the most egregious omission from the government's reply . . ." (appellant's brief, page 16). He claims that the letter from the Internal Security Division confined itself to denying wiretapping conducted " 'pursuant to Title III of Public

Law 90-351' " and ignored the possibility of unwarranted national security wiretaps. The scope of the Government's reply on this account clearly indicates that appellant's interpretation is in error. The letter reads in pertinent part:

> "The inquiries specifically covered all electronic surveillance, including that conducted pursuant to Title III of Public Law 90-351 as well as surveillance where one of the parties have consented thereto."

It is respectfully submitted that there is no "omission" in the Government's reply.

In summary, the Government was not required to affirm or deny under 18 U.S.C. 3504. The case against appellant was routine and the evidence offered was limited strictly to the contents of appellant's own Selective Service file. In any event the appellant was not entitled to a response with respect to the attorney overhearings because he made absolutely no showing that his attorneys had in fact been overheard nor did he demonstrate how such suspected activities could have tainted the evidence against him. The Government's response with respect to his bare, conclusory claim that he had been the object of electronic surveillance, although not in affidavit form, was as broad as the request itself and adequately responded to the claim of illegal surveillance.

POINT III

Appellant was sentenced to three years probation by the District Court. He now complains that he was denied the benefit of sentence as a Young Adult Offender (18 U.S.C. § 4209) by the "irrational" and the "improper" actions of the District Court in imposing sentence.

There can be no doubt that Judge Costantino was aware of the availability of the Youth Corrections Act through the vehicle of § 4209 before imposing sentence on appellant. There also is no doubt that Judge Costantino felt that he could have imposed sentence on appellant as a Young Adult Offender despite the fact that sentence was imposed after appellant's 26th birthday.*

To support his claim that Judge Costantino acted in an improper and irrational manner, appellant isolates a single comment offered by the Judge. Immediately prior to the imposition of sentence, Judge Costantino noted, "I am sure you can be a good, upstanding citizen there is no question about that" (Minutes of sentencing, February 8, 1974, pg. 16). A review of the entire sentencing transcript reveals that Judge Costantino was addressing himself solely to the question of whether appellant required the kind of treatment available under the Youth Corrections Act. In imposing a probationary sentence, Judge Costantino undoubtedly concluded that such treatment was not necessary. However, the minutes also reveal quite accurately that Judge Costantino properly exercised his

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* The Memorandum Decision of Judge Costantino was filed before appellant's 26th birthday. However, sentence was actually imposed after his 26th birthday. It seems clear that this Court would nevertheless consider the Youth Corrections Act available to the Court as a sentencing alternative. *United States* v. *Schwarz*, —— F.2d —— (2d Cir.), slip op. 4961, 4965 note 4, decided July 23, 1974.

discretion in deciding that the balance of benefits available under a sentence pursuant to the Youth Corrections Act should be denied appellant. The decision was solely within the discretion of the District Court which was best able to determine the appropriate sentence to be imposed. *Dorszynski* v. *United States*, 42 U.S.L.W. 5156, decided June 26, 1974.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
THOMAS R. MAHER,
Assistant United States Attorneys,
Eastern District of New York,
Of Counsel.

★ U. S. Government Printing Office 1974— 614—241—29

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of August 1974 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Jesse Berman, Esq.
351 Broadway
New York, N. Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

Sworn to before me this
14th day of August 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975